IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 41

A. L. MECHLING BARGE LINES INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From The United States District Court
For The Eastern District Of Missouri,
Eastern Division

REPLY TO MOTIONS TO AFFIRM.

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The Scheffer Press, Inc.—ANdover 3-6850

INDEX

CITATIONS.

CASES:

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REPLY TO MOTIONS TO AFFIRM.

Pursuant to Rule 16(3) of the Revised Rules of this Court, appellants file this single reply to the respective Motions to Affirm filed by the intervening appellees on February 20, 1961, and the Commission by the Solicitor General on March 2, 1961. Counsel for appellants received the latter Motion to Affirm by air mail on March 6, 1961.

ARGUMENT.

Introduction.

The motions to affirm depend on certain assumptions:

Appellees would pass *sub silentio* the illegality of the Commission's admitted practice of entering these rate orders without any findings whatever, and boldly assume that when, as here it is duly alleged that a practice is followed to the injury of parties who complain of it, and also of a specific instance thereof, the defendants-appellees may frustrate judicial power and persist at will in the practice that is challenged as unlawful by merely suspending it as to the particular instance.

> "Two months after the complaint was filed, but before the case came on for trial, respondent discontinued the use of these contracts and substituted different compensation plans not now before us. • • • Despite respondent's voluntary cessation of the illegal conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power."
>
> *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43 (1944).

> "The interests there passed on are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached, and that the Government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy or terminate its questions."
>
> *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 516 (1911).

Secondly, appellees assume that the specific *instance* of the illegal practice alleged, *viz.*, the Commission's Order F.S.O. 19059, has now no possible effect, an assumption that is both erroneous and curiously inconsistent with their action in not vacating that order (and in strenuously resisting its judicial review in this proceeding).

I. THE CONTROVERSY IS JUSTICIABLE.

Appellees would have it that this is "the classic case of mootness." That, however, would be the case of a sham controversy in which the parties only pretend to be in disagreement, such as *Lord* v. *Veazie*, 8 How. (49 U. S.) 250 (1850), referred to in *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43 (1944) quoted above. This is not the case, illustrated by appellees' citations, of a single instance of illegal conduct that has been voluntarily terminated, leaving no existing controversy for judicial power to decide. The complaint in this cause (par. 19) squarely alleges that "• • • the Commission still follows the practice of entering such orders without supporting findings." The answers of the Commission and of the intervening appellees do not deny that averment. The failure to deny the averment admits it. Fed. R. Civ. P. 8(d).

The decisions of this Court are clear that when, as here, the complaint is of an unlawful practice, as well as of an instance of it, the mere voluntary discontinuance (after suit brought) of the instance of the practice does not terminate the *controversy* nor oust judicial power. (*Walling* v. *Helmerich & Payne, supra; Southern Pacific Terminal Co.* v. *I.C.C., supra*) The Commission *admits on the pleadings* that it "still follows the practice," as above quoted. When, as here, the practice complained of as unlawful is a practice of a regulatory agency of the United States this Court emphasizes the consideration of public importance in rejecting any suggestion that

when one instance of the challenged practice lapses there is nothing left within the ambit of judicial power. *Southern Pacific Terminal Corporation* v. *Interstate Commerce Commission, supra.*

The grant of judicial power to decide "cases and controversies" in Article III of the Constitution of the United States does not require federal courts to permit private parties, or governmental agencies, freely to persist in an illegal practice, avoiding judicial review by suspending any instance of it before judicial challenge can be pushed to ultimate decision. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515-516 (1911); *Southern Pacific Company* v. *Interstate Commerce Commission,* 219 U.S. 433, 452 (1911); *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 308; *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 43 (1944). Neither the Constitution, nor the Acts of Congress that submit the Commission to judicial review (which now include the Administrative Procedure Act, 5 U.S.C. §1001 *et seq.* and the Declaratory Judgment Act, 28 U.S.C. 2201) establishes any such no-man's-land for the unrestrained play of naked administrative power.

> "The *questions* involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission *without a chance of redress.*" (Our emphasis)
>
> *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, 515 (1911).

What redress have these appellant water carriers for injuries inflicted by the practice of entering these "temporary" rate orders without hearings or findings, a prac-

tice in which it is admitted on the pleadings that the Commission "still persists"—orders that are not susceptible of any collateral attack—and whose term, after being prolonged by administrative and judicial maneuver, is then abruptly ended in any instance when at last judicial determination appears imminent, without, however, redressing injuries they have inflicted, or vacating the orders, or abandoning the practice?

The Government's motion refers to the practice complained of, which is to enter "temporary" rate orders without any hearing or findings whatever, as "the alleged Commission policy." The "allegation" so referred to is that "the Commission *still persists* in the practice of entering such orders." (Complaint, par. 19). The Government would ignore the fact that the Commission's answer below did not deny that allegation. It is not only the "alleged" Commission policy—it is the admitted Commission policy.

The Government suggests (p. 6) that there was nothing before the lower court to show the "extent or nature" of that admitted practice. Its nature is fully disclosed in the description that the complaint gives of the particular instance; and the admitted averment is that the Commission still persists in the practice of entering *such* orders (Complaint, par. 19).

As to its extent, here is a practice in which, as admitted on the pleadings, the Commission persists. The case has not been tried. Evidence never belonged in pleadings, even before the Federal Rules of Civil Procedure. *Commissioner* v. *Livacoli*, 252 F. 2d 268, 272 (6th Cir. 1958); *Dunn* v. *J. P. Stevens & Co.*, 192 F. 2d 854, 855 (2d Cir. 1951); *Cater Construction Co., Inc.* v. *Nischwitz*, 111 F. 2d 971 (7th Cir. 1940).

Incidentally, other instances of the practice, one of them involving one of these appellants and this very grain traffic from northern Illinois insofar as it consisted of corn, were detailed in certain affidavits that appellants had presented in this case to the lower court in another connection.[1]

As the affidavits also show, the Commission in that instance (referred to by the intervening appellees as *Corn & Corn Products, Illinois to Official Territory*, 310 I.C.C. 437, 438) prevailed upon a statutory three-judge court sitting in the 7th Circuit to dismiss that appellant's application for an injunction against that "temporary" order, for a supposed want of jurisdiction of the subject matter. The consequence is that a plaintiff forced to proceed in the Seventh Circuit cannot get an injunction there, although in two other circuits, contrary rulings have been made by three-judge courts. And as to those circuits the Government fails to comment on the unredressed injury of diverted traffic inflicted on the water carriers in those cases before the schedules were suspended or withdrawn. (Cf. *Seatrain Lines* v. *U. S.*, 168 F. Supp. 819 (S.D. N.Y. 1958) In the three cases enumerated on page 10 of the Jurisdictional Statement, the applications were withdrawn. The permanent order in *Corn and Corn Products, Illinois to Official Territory, supra*, was entered about three years after the "temporary" order. Two or three-year periods are typical, of the effective duration of the Commission's "temporary" fourth section orders entered over protest, without hearing or findings.

These are matters of evidence; the case has not been tried. The complaint described the injurious and un-

[1] Appellants moved for a summary judgment. The motion was not ruled on.

lawful practice of the Commission, alleging that the Commission still persists therein, and the Commission's answer, which does not deny that averment, thereby admits that the Commission "still persists" in the practice complained of. In that situation the "controversy" continues, and there is no ouster of judicial power to look into the legality of that continued practice and all details of the situation which it creates. (Auth. cit.)

II. APPELLANTS HAVE A PRESENT INTEREST IN HAVING F. S. O. 19059 REVIEWED.

As has been shown, this case presents a continuing justiciable controversy even if the appellees' second mistaken assumption were correct, *viz.*, that the particular instance of the unlawful practice, (F.S.O. 19059) had lost all effect.

However, appellees do not deny that Order F.S.O. 19059 can be attacked only in this proceeding, brought for its direct review (and could not be collaterally attacked in an action for the damages inflicted by these unlawful rates, which that order unlawfully authorized). They do not deny, therefore, that this very order has the continuing effect of barring any attempt to effect such a recovery. (J. S. 15, 16) The Government suggests a doubt whether appellants, who are not shippers, could in any event recover the damages they suffered. (Motion, p. 4) If the suggested doubt were valid, that would further demonstrate that appellants are forever remediless for the injury suffered while these rates authorized by such "temporary" orders are in effect.

If, on the other hand, the suggested doubt is invalid, then the unlawful "temporary" order, so long as it stands unreviewed, bars a recovery that, in a subsequent action, appellants might otherwise be able to show they were entitled to have.

In either event, so long as that order remains unreviewed, appellants could never get beyond that order or reach the question as to which the Government suggests doubt. The Government's doubts as to the merits of that question are collateral here. The obvious continuing effect of the order is conclusively to prevent appellants from submitting that question on its merits to an appropriate court.

This order has other continuing effect, as will appear. But before leaving this one, we note that the Government does not suggest that *shippers* could not recover their damages from rail rates which were unlawfully authorized without any findings of fact and made immediately effective before protests could be judicially reviewed. (Motion, 4) The statutory right of recovery given by Section 8 of the Interstate Commerce Act is not limited to shippers.

> "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to *the person or persons injured thereby* for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (Our emphasis) 49 U.S.C. Section 8.

The Government's suggestion that "the person or persons injured thereby" means "shippers only," is peculiarly indefensible when the illegality in question arises from the long and short haul provision of Section 4,

which was clearly enacted for the protection of the competing water carrier, as well as the higher-rated intermediate shipper. (J. S. p. 12)

These abnormal rates were in effect under the temporary order for fourteen months and the abnormal reductions in the intermediates (reductions in rail rate revenue made to avoid review of that unvacated order) can be expected to remain in effect only until the next general rail freight rate increase excepts barge-competitive rates, in the expectation of immediate fourth section relief. This continued effect on the barge-competitive rail rates in the future, is of exactly the same kind referred to by the court in *Southern Pacific Company* v. *Interstate Commerce Commission, supra,* when it held:

> "• • • and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy." 219 U. S. at p. 452.

Compare, also, the successive separate taxes levied in *Papoliolios* v. *Dunning,* 175 F. 2d 73 (2d Cir., 1949).

III. APPELLEES' CITATIONS ARE NOT APPOSITE.

Appellees labor in vain to distinguish this Court's decision in the *Southern Pacific* cases (219 U. S. 453 and 219 U. S. 498)

Intervening appellees say that they were both rate cases (Motion p. 5). That is a mistake; one was a discrimination case. The court said:

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings.

> But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." 219 U. S. at 515.

The court then quoted and relied on its decision in *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897) in which the lapsed *instance* of the challenged practice had no possible continuing effect.

The factors emphasized by this Court in both *Southern Pacific* cases as establishing the continuance of judicial power to dispose of the continuing controversy, are presented here.

1. The continuing nature of the question involved in a lapsed order of the Commission.[1]
2. The short terms of the Commission orders determining such questions, when such questions may be involved in similar orders entered by the Commission in the future.[2]

(Here it is admitted on the pleadings that the entry of such orders is a continuing practice of the Commission.)

3. The public character of the question involved.[3]
4. The proper attachment originally of the reviewing court's jurisdiction.

Appellees do not urge that the jurisdiction of the court below did not properly attach originally. In both motions, however, appellees cite *Public Service Commission*

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[1] 219 U.S. 515 and 452.
[2] 219 U.S. 515 and 452.
[3] 219 U.S. 516.

v. *Wycoff*, 344 U. S. 237 (1952).[4] That case held, however, that in electing to sue in a single-judge district court, rather than using the three-judge procedure provided in 28 U.S.C. Section 2284, plaintiff in that case had effectively barred himself from obtaining any review of the constitutional question he sought to present, or of any state action, and so could present to this Court only the abstract question of whether he was, or was not, engaged in interstate commerce. (344 U. S. 244) Obviously such a question was not a proper one originally for the single-judge court to which that plaintiff sought to submit it. That situation is entirely foreign to the one presented; the court below was a three-judge court. Other cases cited by intervening appellees also fail to meet this test of proper attachment of jurisdiction originally.[5]

5. The situation alleged to have made the case moot was created by voluntary action of the defendants, and defendants alone, without the plaintiff's consent or cooperation.[6]

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[4] Intervening appellees' Motion, page 4; Government's Motion, page 6.

[5] **Electric Bond & Share v. Securities & Exchange Commission, 303 U.S. 419 (1937); International L. & W. Union v. Boyd, 347 U.S. 222 (1953)** both cited at page 4 of intervening appellees' motion.

[6] "This court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs, **without any fault of the defendant**, which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed." (219 U.S. at 514, emphasis ours)

* * *

"In **United States v. Trans-Missouri Freight Asso., supra**, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case

In this respect the case is clearly distinguishable from certain cases cited by appellees, including all the labor cases relied on by them. In each of those cases parties asking the Court to retain jurisdiction had themselves negotiated and agreed to the settlement of the dispute or the workers had performed and plaintiff had accepted all the work and their mutual *de facto* settlement then became the basis of allegation of mootness.

Appellees' citations invariably lack one or more of the above enumerated factors.

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* (Continued)
at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: 'The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, * * *.' The case was therefore held not to be moot. Other situations were distinguished. "Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action.'" (219 U.S. at 515-516, emphasis ours)

CONCLUSION.

This proceeding presents a continuing justiciable controversy of great public significance. It is respectfully prayed that the motions to affirm be denied and this Court note its probable jurisdiction.

Respectfully submitted,

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